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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91212477
Party	Plaintiff Balance Bar Company
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Submission	Testimony For Plaintiff
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

In re Application Serial No. 85/751,520
Published for Opposition on March 19, 2013
Trademark: EARTH BALANCE

BALANCE BAR COMPANY,

Opposer,

v.

GFA BRANDS, INC.,

Applicant.

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Opposition No. 91212477

**OPPOSER’S NOTICE OF FILING OF JULY 30, 2014 CORRECTED CERTIFIED
TESTIMONY DEPOSITION TRANSCRIPT AND EXHIBITS OF
PATRICK CORNACCHIULO**

Pursuant to 37 C.F.R. § 2.125(c) and Rule 703.01(k) of the Trademark Trial and Appeal Board Manual of Procedure (“TBMP”), Opposer Balance Bar Company hereby files with the Board, and notifies Applicant of, the corrected certified testimony deposition transcript and accompanying exhibits of Patrick Cornacchiulo, whose testimony deposition was taken on July 30, 2014.

Pursuant to Section 703.01(n) of the TBMP, the transcript has been corrected by writing each correction above the original text that it corrects, each of which has been initialed by Mr. Cornacchiulo. (An Errata Sheet listing the corrections has also been included at the end of the transcript.)

Pursuant to 37 C.F.R. §§ 2.125(e), 2.126(c), TBMP 703.01(p), and the Stipulated Protective Order, approved by the Board on February 20, 2014, the following testimony deposition transcript pages and exhibits have been designated as “Confidential” and are being filed with the Board under seal, under separate cover: Pages 7-11 and 17-36, Opposer’s Exhibits 50-51, and Applicant’s Exhibits 1-6.

Respectfully submitted,

Dated: 29 January 2015

By: /s/ R. Glenn Schroeder
R. Glenn Schroeder
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Attorney for Opposer,
Balance Bar Company

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **OPPOSER'S NOTICE OF FILING OF JULY 30, 2014 CORRECTED CERTIFIED TESTIMONY DEPOSITION TRANSCRIPT AND EXHIBITS OF PATRICK CORNACCHIULO** has been served via US mail and email this 29th day of January 2015 upon the following:

Johanna Wilbert, Esq.
Quarles & Brady LLP
411 East Wisconsin Avenue
Milwaukee, WI 53202
johanna.wilbert@quarles.com

/s/ R. Glenn Schroeder

R. Glenn Schroeder

ORIGINAL

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In the Matter of Application

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Serial No. 85/751, 520

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Published for Opposition on March 19, 2013

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Trademark: EARTH BALANCE

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BALANCE BAR COMPANY,

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Opposer,

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- against -

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GFA BRANDS, INC.,

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Applicant.

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Opposition No. 91212477

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2100 Smithtown Avenue
Ronkonkoma, New York

15

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July 30, 2014
9:15 a.m.

17

18

Examination Before Trial of PATRICK

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CORNACCHIULO, pursuant to Notice, before Cathy

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Leone, a Notary Public of the State of New

21

York.

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A P P E A R A N C E S:

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BY: R. GLENN SCHROEDER, ESQ.

QUARLES & BRADY LLP

Attorneys for Applicant GFA Brands, Inc.

411 East Wisconsin Avenue

Milwaukee, WI 53202

BY: JOHANNA WILBERT, ESQ.

ALSO PRESENT:

LEE GROSSKREUZ HECHTEL, ESQ.

1
2 P A T R I C K C O R N A C C H I U L O,
3 called as a witness, having been duly
4 sworn by a Notary Public, was examined
5 and testified as follows:

6 MR. SCHROEDER: Please mark these
7 documents as Opposer's Exhibits 50 and
8 51.

9 (Opposer's Exhibit 50,
10 Coexistence Agreement, marked for
11 identification.)

12 (Opposer's Exhibit 51, E-mail for
13 a Non-Copyright Notification Complaint,
14 marked for identification.)

15 DIRECT EXAMINATION

16 BY MR. SCHROEDER:

17 Q. Please state your full name for
18 the record.

19 A. Patrick Cornacchiulo.

20 Q. Where are you currently employed?

21 A. NBTY.

22 Q. Since you last testified on May
23 1, 2014 in ^{the} ~~your~~ related Smart Balance
24 proceeding, has your position and
25 responsibilities with the Balance Bar Company

Direct - Cornacchiulo

changed?

A. No.

Q. The parties have agreed that we can admit your earlier testimony from the related Smart Balance proceeding. That means we will not repeat your earlier testimony. Today we will focus on the additional documents produced in these proceedings and any additional facts not discussed in your earlier testimony, okay?

A. Okay.

Q. Were business records and files transferred from Brynwood Partners to NBTY upon the sale of the company by Brynwood Partners?

A. Yes.

Q. Were these business records and files utilized and relied upon by NBTY in continuing the operation of the company?

A. Yes.

Q. Did these business records and files include prior settlement agreements and cease and desist letters?

A. Yes.

Direct - Cornacchiulo

Q. Let me show you what has been marked as Opposer's Exhibit 50 (handing). Do you recognize this document as one of the business records that was transferred from Brynwood Partners to NBTY?

A. Yes.

Q. Can you identify this document for me?

A. This is a Coexistence Agreement with Abbott Laboratories.

Q. Thank you.

Let me show you what has been marked as Opposer's Exhibit 51 (handing). Do you recognize this document as one of documents transferred to NBTY by Brynwood Partners?

A. Yes.

Q. Can you identify this document for me?

A. It is an e-mail for a Non-Copyright Notification Complaint.

MR. SCHROEDER: Thank you.

At this point, I would like to mark the transcript for Attorneys' Eyes

Direct - Cornacchiulo

Only.

(The following portion has been
deemed confidential and bound under
separate cover.)

1 Direct - Cornacchiulo

2 Q. When you testified in May in
3 connection with the Smart Balance proceeding,
4 we spoke about GFA Brands. Let's expand on
5 this. Do you currently consider GFA Brands to
6 be a competitor of the Balance Bar Company?

7 A. I don't consider them a
8 competitor in my space. Obviously, that's
9 what we monitor. Health is our category in
10 our section of the store, but we wouldn't be
11 here if we didn't have --

12 Q. Why, to be specific --

13 A. They currently don't make a
14 product that is close to ours and we currently
15 don't have a need to be close into their
16 territory.

17 Q. So, along those lines, if GFA
18 Brands would begin selling nutrition ^{or} energy
19 bars, would you then consider them a
20 competitor?

21 A. Yes.

22 Q. Do any of your competitors use
23 the word balance in their trademarks?

24 A. No.

25 Q. So, if GFA Brands would begin

Direct - Cornacchiulo

selling nutrition energy ^{or} ~~brands~~ ^{bans} ~~enduring~~ ^{under} the
Earth Balance mark, do you believe that would
cause confusion in the marketplace?

A. Yes.

Q. Explain your thinking as to why
there might be confusion in the marketplace.

A. We have a close-in style for our
section, a type of product, based on how they
describe their products, non GMO, what we call
clean -- you know, simple ingredients and so
forth in our bar category. Bare Bar
launching, we have an old style, but we have a
new type of bar that's out now that's even
cleaner and so we are launching and shipping
it and that's the type of bar that we would be
targeting, a Whole Foods style customer -- you
know, healthy, natural customer -- consumer --
sorry -- consumer based. So, I think there
would be a close-in there on that type of
product.

Q. So, this new launch that you
mentioned would be in stores at Trader Joe's,
Whole Foods, Natural Foods Stores?

A. Yes. We are sold in all

Direct - Cornacchiulo

channels, so it is our sales team's, you know, job to go fill those channels. Right now, Balance is in Whole Foods. It is in all of the natural sets in mass market even because expansion is growing everywhere, so natural sets are becoming a part of your mainstream, but we are in every channel at this point in time.

Q. How do you think consumers would react to seeing an Earth Balance nutrition bar, for example, let's say at Trader Joe's or Whole Foods?

MS. WILBERT: Objection to foundation.

MR. SCHROEDER: You can answer to the best of your ability.

PC
A. If the bars are right next to each other, I think there could be confusion between the brands Balance and Balance Bar ^{and} ~~just like~~ ^{Balance} Earth ~~Bar~~. If the brands are using similar health benefits and playing off the idea of some type of balance, so Balance Bar is not Balance like Balance Original. Balance Original is balanced on nutritional and

Direct - Cornacchiulo

1
2 Balance Bar is balanced on low glycemic. You
3 can be balanced in several ways. Balance
4 doesn't mean one thing. We center it around
5 nutrition of some sort, but if you are
6 centering some type of balanced nutrition,
7 there can be confusion. It might be oh, this
8 is a different bar for this reason because
9 that's the way we always center the product.

10 Q. It could be due to an extension
11 of the line or Balance line?

12 A. Yes.

13 MR. SCHROEDER: Let's take a
14 five-minute break and we are just about
15 done.

16 (Recess taken.)

17 MR. SCHROEDER: No further
18 questions for me. Thank you for coming
19 in this morning.

20 CROSS-EXAMINATION

21 BY MS. WILBERT:

22 Q. In your past depositions, you
23 have given some testimony about sales
24 information. I would like to start by talking
25 to you about some sales information.

Cross - Cornacchiulo

A. Okay.

MS. WILBERT: Mark this as
Applicant's Exhibit 1.

(Applicant's Exhibit 1, Balance
Bar's Responses to GFA's Second Set of
Interrogatories dated July 28, 2014,
marked for identification.)

(The following portion has been
deemed confidential and bound under
separate cover.)

Cross - Cornacchiulo

Q. I refer to the Balance Bar Trademarks at issue in this case. Do you understand those trademarks to be Balance, Balance Bar, Balance Gold, Balance Bar Gold, Balance Bare and Balance Pure?

A. Yes.

Q. Earlier today you testified about NBTY's knowledge of the Simply Balanced trademark. Do you remember that testimony?

A. Yes.

Q. Were you aware that in Balance Bar Company's interrogatory responses dated August 6th of 2012 in the Smart Balance opposition, that Balance Bar Company identified Simply Balanced as a trademark they were aware of?

A. After -- yes, after the last deposition, yes.

Q. So, even though NBTY was recently aware of the Simply Balanced trademark, Balance Bar Company through its previous owners did have awareness of the Simply Balanced trademark as of 2012?

A. Yes.

Cross - Cornacchiulo

1 Q. And in 2012, did Balance Bar
2 Company take any action with respect to
3 Target's use of a Simply Balanced trademark?
4

5 A. I can't remember that document.

6 Q. Sitting here today, are you aware
7 of any action that the Balance Bar Company has
8 taken in connection with the Simply Balanced
9 trademark?

10 A. I don't remember any. I just
11 can't remember.

12 Q. Earlier today you testified that
13 some documents were transferred with the sale
14 of the company. Do you remember that?

15 A. Yes.

16 Q. Who were those documents
17 transferred to in the company?

18 A. They were transferred to -- they
19 were originally transferred to CMO.

20 Q. Who is that?

21 A. And ^KLatia Fischetti and Eric and
22 then obviously as I took over, I have access
23 to all of the documents too. I don't know
24 which department actually received the
25 documents first during the acquisition, but I

Cross - Cornacchiulo

know that a lot of stuff was reviewed, but I can't tell you exactly where they came to first.

Q. Have you reviewed any documents regarding communication with Target involving the Simply Balanced trademark?

A. Not prior to our conversation the last time, no.

Q. What about after our conversation?

A. No. I haven't heavily dug into the documents on this.

Q. As part of your job duties, is it your responsibility to maintain the documents from the transfer or does that responsibility fall to someone else?

A. It is not my job to maintain the documents, no and to be honest with you, I can't tell you who is responsible. I know we have a repository of documents, probably through a legal department where we put them, but I would have to find out whose exact responsibility that is.

Q. Those would be the same documents

Cross - Cornacchiulo

as the license agreement that we have discussed in the previous deposition?

A. Yes. Anything that's a legal document is stored.

Q. And not your area?

A. Yes, not my area, so I am not an expert on that.

MS. WILBERT: Mark this, please, as Exhibit 8.

(Applicant's Exhibit 8, Example of the Earth Balance trademark as it is used in connection with popcorn bearing production number GFA EB002044, marked for identification.)

Q. I would like to switch gears and talk to you about some of the Earth Balance products. I am handing you what has been marked as Applicant's Exhibit 8, which is an example of the Earth Balance trademark as it is used in connection with popcorn (handing). I am giving this to you, so you have an example of what the trademark looks like.

A. Um-hum.

Q. Are you aware of any instances of

Cross - Cornacchiulo

actual confusion between Earth Balance popcorn and any of the products sold by Balance Bar?

A. No.

Q. Are you aware of any instances of confusion between the Earth Balance peanut butter and any products sold by Balance Bar?

A. No.

Q. Are you aware of any instances of confusion between any of the Earth Balance products and any of the products bearing the Balance Bar trademarks?

A. No.

Q. Are you aware of any instances of confusion between any of the Smart Balance products and any of the products bearing the Balance Bar trademark?

A. No.

MS. WILBERT: Mark this, please, as Exhibit 9.

(Applicant's Exhibit 9, Picture of a Healthy Balance branded apple cranberry juice bearing production number GFA EB002210, marked for identification.)

Cross - Cornacchiulo

Q. I have just handed to you what has been marked as Applicant's Exhibit 9 (handing). Applicant's Exhibit 9 is a picture of a Healthy Balance branded apple cranberry juice; is that correct?

A. Yes.

Q. Exhibit 9 is another example of a third party using the word Balance in part of their trademark when selling products in a grocery store. Are you aware of any instances of actual confusion between Healthy Balance's apple cranberry juice and any of the products offered under the Balance Bar trademarks?

A. No.

Q. Are you aware of any instances of confusion between any third party that's using the term Balance in their trademark and any of the Balance Bar products?

A. No.

MS. WILBERT: Let's take a five-minute break.

(Recess taken.)

Q. Could you please take out Exhibit 4, please?

1 Cross - Cornacchiulo

2 A. Sure.

3 Q. Within each category, it appears
4 to me that the account names are in
5 alphabetical order; is that correct?

6 A. Yes.

7 Q. Their order has no reflection on
8 the revenues sold to Balance Bar; is that
9 correct?

10 A. No.

11 MS. WILBERT: Mark this, please,
12 as Exhibit 10.

13 (Applicant's Exhibit 10,
14 Trademark application for the Earth
15 Balance trademark in connection with
16 dried, ready to eat fruit and vegetable
17 bars, marked for identification.)

18 Q. In your earlier testimony in the
19 Smart Balance opposition, you testified about
20 some enforcement efforts that you were
21 involved in in regard to the records you
22 received. Do you remember?

23 A. Yes.

24 Q. I am handing you what has been
25 marked Exhibit 10 (handing). Please confirm

Cross - Cornacchiulo

that it is a trademark application for the Earth Balance trademark in connection with dried, ready to eat fruit and vegetable bars?

A. Yes.

Q. This is an application for the Earth Balance trademark in connection with bars that was filed on January 26, 2005, correct?

A. Yes.

Q. This application for Earth Balance in connection with bars was published for opposition on October 25, 2005, correct?

A. Yes.

Q. Balance Bar did not file a notice of opposition to oppose the application for the registration of Earth Balance in connection with bars, correct?

MR. SCHROEDER: Objection. There is no notation on this document what they did or didn't at this point.

MS. WILBERT: I agree. I am asking the witness.

MR. SCHROEDER: If you know?

A. I don't know.

Cross - Cornacchiulo

Q. From the records that you have reviewed, do you have anything to indicate that Balance Bar did, in fact, file a notice of opposition?

A. I don't remember, no.

Q. So, if there were to be nothing on record with the trademark office, it would be reasonable to conclude that Balance Bar did, in fact, not file an application in opposition with this trademark application, correct?

A. Yes.

MS. WILBERT: That is all.

MR. SCHROEDER: Just a couple of questions.

REDIRECT EXAMINATION

BY MR. SCHROEDER:

Q. Can I ask you to pull out what was marked as Applicant's Exhibit 7, please.

A. (Witness complies.)

Q. Just earlier you were asked about this document and you were referred to interrogatory responses which were filed by Opposer back in 2012, which listed the

Redirect - Cornacchiulo

trademark Simply Balanced. Do you recall that earlier testimony?

A. Yes.

Q. To the best of your knowledge, when did Target actually start selling bars under the Simply Balanced mark?

A. We were only recently aware. It came to our awareness last month or so.

Q. Is it your understanding that bars were actually being sold back in 2012?

A. To my understanding, it was that we don't think they were selling the bars that far back.

Q. At that time, was Target also using the Simply Balanced mark in connection with another name -- another brand?

A. Their original prime labeler was Archer and then they would have a sub brand underneath Archer. They had Archer as their label. I don't know when they changed and deleted the Archer.

MR. SCHROEDER: Thank you. No further questions for me.

(Time noted: 10:30 a.m.)

A C K N O W L E D G M E N T

STATE OF NEW YORK)
 : ss
COUNTY OF)

I, PATRICK CORNACCHIULO, hereby
certify that I have read the transcript of my
testimony taken under oath in my deposition of
July 30, 2014; that the transcript is a true,
complete and correct record of my testimony,
and that the answers on the record as given by
me are true and correct.



PATRICK CORNACCHIULO

Signed and subscribed to before
me, this 3rd day
of November, 2014.


Notary Public, State of New York

CAROL ANN LAHMANN
Notary Public, State of New York
No. 01LA6171325
Qualified in Suffolk County
Commission Expires July 23, 2015

-----I N D E X-----

WITNESS:	DIRECT	CROSS	REDIRECT
PATRICK	3	15	45
CORNACCHIULLO			

-----EXHIBITS-----

OPPOSER'S FOR I.D.

50	Coexistence Agreement	3
51	E-mail for a Non-Copyright	
	Notification Complaint	3

APPLICANT'S FOR I.D.

1	Balance Bar's Responses to	
	GFA's Second Set of	
	Interrogatories dated July	
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8	Example of the Earth Balance	
	trademark as it is used in	
	connection with popcorn	
	bearing production number	
	GFA EB002044	40

-----EXHIBITS (Continued)-----

APPLICANT'S

FOR I.D.

9 Picture of a Healthy Balance

branded apple cranberry

juice bearing production

number GFA EB002210

41

10 Trademark application for

the Earth Balance trademark

in connection with dried,

ready to eat fruit and

vegetable bars

43

(Reporter retained exhibits.)

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C E R T I F I C A T E

STATE OF NEW YORK)
) ss.:
COUNTY OF NASSAU)

I, CATHY LEONE, a Notary Public
within and for the State of New York, do
hereby certify:

That PATRICK CORNACCHIULO, the
witness whose deposition is hereinbefore
set forth, was duly sworn by me and that
such deposition is a true record of the
testimony given by such witness.

I further certify that I am not
related to any of the parties to this
action by blood or marriage; and that I
am in no way interested in the outcome
of this matter.

IN WITNESS WHEREOF, I have
hereunto set my hand this 2nd day of
August, 2014.

Cathy Leone

CATHY LEONE

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

In re Application Serial No. 85/751,520
Published for Opposition on March 19, 2013
Trademark: EARTH BALANCE

BALANCE BAR COMPANY,

Opposer,

v.

GFA BRANDS, INC.,

Applicant.

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Opposition No. 91212477

**ERRATA SHEET TO TRIAL TESTIMONY TRANSCRIPT OF
PATRICK CORNACCHIULO - PUBLIC**

PAGE	LINE	CORRECTION	REASON
3	23	From “your” to “the”	Transcription Error
12	18	From “nutrition” to “nutrition or”	Transcription Error
13	2	From “nutrition energy brands enduring” to “nutrition or energy bars under”	Transcription Error
14	21	From “just like Earth Bare” to “and Earth Balance”	Transcription Error
15	6	From “balance” to “balanced”	Transcription Error
38	21	From “Catia” to “Katia”	Spelling Error

5 count

push to
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Simply
balariced™

nut & seed bars
made with mixed nuts,
sunflower
& pumpkin seeds



Serving suggestion

NET WT 6.2 OZ (175g) / 5-1.2 OZ (35g) BARS

MOZAMBIQUE

EXHIBIT 7
Applicant's
BBY GFA
Opp: 91212477 (C)
PENGAD 800-631-6989

BEST BY
2/28/2019 BP
4040 019 11 05

plant-based
diet
friends

earth balance™

vegan aged white cheddar flavor
popcorn

Vegan

Gluten-Free

0g
Trans
Fat

Non-
GMO

SEE NUTRITION INFORMATION
FOR FAT CONTENT

NET WT. 7 OZ (198g)

EXHIBIT 8
Applicant's
BB & GFA
APP. NO.
91212477



EXHIBIT 9
Applicant's
BB v GFA
DPP, US.
9/2/2477 CC
PENGAD 800-631-6989

GFA_EB002210



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EARTH BALANCE

Word Mark	EARTH BALANCE
Goods and Services	(ABANDONED) IC 029. US 046. G & S: Dried, ready to eat fruit and vegetable bars
Standard Characters Claimed	
Mark Drawing Code	(4) STANDARD CHARACTER MARK
Serial Number	78554482
Filing Date	January 26, 2005
Current Basis	1B
Original Filing Basis	1B
Published for Opposition	October 25, 2005
Owner	(APPLICANT) GFA Brands, Inc. CORPORATION DELAWARE P.O. Box 397 311 Knickerbocker Road Cresskill NEW JERSEY 07626
Attorney of Record	John L. Ambrogi
Prior Registrations	2237867
Type of Mark	TRADEMARK
Register	PRINCIPAL
Live/Dead Indicator	DEAD
Abandonment Date	August 14, 2006

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